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## Consolidated Edison Company of New York v. Public Service Commission: Freedom of Speech Extended to Monopolies - Is There No Escape for the Consumer?

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***Consolidated Edison Company of New York v. Public  
Service Commission: Freedom of Speech  
Extended to Monopolies—Is There No Escape  
for the Consumer?***

*The author's focus is upon an opinion of the United States Supreme Court which silently extended first amendment freedoms to a corporate monopoly. The majority attempts a balancing of the monopoly utility's freedom of speech against the state's protection of the privacy interests of the ratepayers and finds the privacy interest not to be so compelling as to justify any restriction on freedom of speech. The author suggests that the privacy interest is so substantial as to be compelling and further agrees with the dissent, that because of the special position of the Consolidated Edison Company as a monopoly and its rate structure, the ratepayers are a captive audience who are compelled to subsidize the utility's opinions.*

On June 20, 1980, the United States Supreme Court decided the case of *Consolidated Edison Company of New York v. Public Service Commission of New York*.<sup>1</sup> With this decision, the Court extended full first amendment protection to the free speech of a corporate monopoly despite the resulting encroachment upon the privacy interest of its captive consumers.

The Consolidated Edison Company of New York is a public utility permitted to operate as a monopoly under the laws of the State of New York.<sup>2</sup> As such, it is under the regulatory jurisdiction of the Public Service Commission of New York.<sup>3</sup> New York law gives the Public Service Commission broad supervisory powers over all real and personal property "used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power,"<sup>4</sup> as well as giving it power over the contents of everything which goes into the billing envelope.<sup>5</sup>

In January 1976, Consolidated Edison placed an insert in its billing envelope expressing the corporation's opinion on nuclear

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1. 100 S. Ct. 2326 (1980).

2. N.Y. PUB. SERV. LAW § 68 (McKinney 1955).

3. N.Y. PUB. SERV. LAW § 64 (McKinney 1955).

4. N.Y. PUB. SERV. LAW § 2.12 (McKinney 1955).

5. N.Y. PUB. SERV. LAW § 66.12-a (McKinney Supp. 1980-81) provides in part: The commission shall: "Have power to fix and alter the format and informational requirements of bills utilized by public and private gas and electric corporations in levying charges for service . . . ."

power and its benefits.<sup>6</sup> In March 1976, the Natural Resources Defense Council, Inc. (NRDC) requested that Consolidated Edison enclose a rebuttal in their next billing envelope. Consolidated Edison refused.

NRDC then petitioned the Public Service Commission to use its jurisdiction to compel Consolidated Edison to open their billing envelopes to opposing viewpoints. The Commission denied NRDC's request but did issue an order prohibiting utilities under its control from using their billing envelopes to disseminate corporate views on controversial issues of public importance. In its Statement of Policy on Advertising and Promotion Practices of Public Utilities,<sup>7</sup> the Commission stated that its order was based on the fact that Consolidated Edison's customers are a captive audience by virtue of the fact that they must receive their electrical power and their bills from the utility. As such, they should not be subjected in their homes or offices to Consolidated Edison's beliefs. In addition, the Commission noted that the order was predicated upon the fact that there was nothing to indicate that those very consumers were not being forced to subsidize the controversial inserts through a pass-along of the cost as an operational expense, or by giving the inserts a "free ride," since they were included in the billing envelope which, along with postage, was already included in the utility's rates.<sup>8</sup> The Commission, however, allowed Consolidated Edison to continue sending bill inserts which did not deal with public policy issues but rather with issues concerning its ratepayers vis-à-vis the service they received from the utility, based on the rationale that these inserts benefited the ratepayers themselves, not merely the utility.

Consolidated Edison then sought judicial review of the order of the Public Service Commission banning utilities from using bill inserts to express their views. The Commission's order was affirmed by the New York Court of Appeals,<sup>9</sup> and on appeal to the United States Supreme Court, the Court reversed on the ground that the Commission's order impermissibly infringed on Consolidated Edison's constitutionally protected speech since the ban was based only on content and was, therefore, invalid. The majority glossed over the reality that because Consolidated Edison is

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6. The January 1976 billing envelope "stated Consolidated Edison's views on 'the benefits of nuclear power,' saying that they 'far outweigh any potential risk' and that nuclear power plants are safe, economical, and clean." In addition, the utility contended that increased use of nuclear power would decrease this country's dependence on foreign energy sources. 100 S. Ct. at 2330.

7. *Id.*

8. See generally note 58 *infra*.

9. Consolidated Edison v. Public Service Commission, 47 N.Y.2d 94, 390 N.E.2d 749, 417 N.Y.S.2d 30 (1979).

the kind of monopoly from which there is no practical escape, holding its customers as a captive audience in their own homes, substantial privacy rights are thereby invaded.<sup>10</sup>

Justice Blackmun's dissent, with Justice Rehnquist joining in part, protested that by virtue of the position of Consolidated Edison as a state-created monopoly, extensive supervision on the part of the state is justified<sup>11</sup> to protect the utility's ratepayers from invasion of their constitutional right of freedom of association. The dissent was concerned with the ratepayers' compelled association with the utility's beliefs and the forced subsidy they are subjected to because of the utility's particular rate structure.

This note will review the opinion of the Court and that of the dissenting justices. In addition there will be a discussion of what the outcome might have been had the majority, like the dissent, applied legitimate concerns for the privacy and associational rights of Consolidated Edison's customers to the realities of the particular case. If the Court had looked at Consolidated Edison as a service monopoly rather than as an ordinary business corporation, this author believes that the Court would, and should,

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10. The Court has consistently held that the home is a citadel of privacy. *See, e.g., Stanley v. Georgia*, 394 U.S. 557 (1969), in which the Court found a statute unconstitutional which purported to make criminal the possession of obscene material wherever it is found, even in one's own home. "[T]he States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. *See also* notes 79-87 *infra* and accompanying text.

11. As a general rule monopolies are contrary to the public policies of the State of New York. *See, e.g., N.Y. GEN. BUS. LAW* § 340 (McKinney 1968); *Baker v. Walter Reade Theatres, Inc.*, 37 Misc.2d 172, 173, 377 N.Y.S.2d 795, 796 (1962) in which the New York Supreme Court, Special Term, held that the objective of § 340 was to ensure "free competition in the business, trade or commerce of the furnishing of any service in this State . . . ." Utilities, however, are excepted from the general rule and for that reason the State of New York created the Public Service Commission, N.Y. PUB. SERV. LAW § 4 (McKinney Supp. 1980-81), and gave it jurisdiction over these utilities. N.Y. PUB. SERV. LAW § 5 (McKinney Supp. 1980-81). "Private electrical companies are protected in New York State from unlicensed competition . . . , however, their monopolistic control of the desired service is in turn subjected to the regulatory powers of the Commission." *Rochester Gas and Electric Corp. v. Public Service Commission*, 414 N.Y.S.2d 754, 756, 66 A.D.2d 509, 512 (1979).

In *Radio Common Carriers of New York v. Public Service Commission*, 79 Misc.2d 600, 603, 360 N.Y.S.2d 552, 555 (1974), it was held that:

The PSC is charged with the responsibility of administering the Public Service Law and its determination of the applicability of that law to those areas of communication assigned to it for regulation will not be set aside by the courts if there is a rational basis for the conclusions reached.

have enunciated new rules restricting the first amendment protection given to monopolies.

## I. THE MAJORITY'S ANALYSIS

The majority based their rationale on the traditional, time-honored tenets of prior first amendment content-based regulation decision.<sup>12</sup> Those decisions require that the state show a compelling interest before it limits first amendment rights and balance that interest against all competing interests presented by the specific facts of the case before it.<sup>13</sup>

Justice Powell, writing the opinion of the Court, noted that the first and fourteenth amendments of the United States Constitution guarantee that no state shall "abridg[e] the freedom of speech . . . ." State action<sup>14</sup> is assumed since the Public Service Commission is a regulatory agency sanctioned by the State of

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12. The Court has consistently held that first amendment guarantees hold a preferred position in relation to other constitutional guarantees because it holds within it rights essential to a free society. *See, e.g.*, *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *see note 4, infra*, in which full protection of the First Amendment guarantee of free speech was accorded business corporations; *Police Department v. Mosley*, 408 U.S. 92 (1972), in which the Court held that picketing may be regulated only as to time, place, or manner; *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) in which it was held that absent a showing of material and substantial interference with discipline, school officials may not constitutionally prohibit the expression of particular opinions by students. The problem with deciding the case on these principles is that the Court is totally ignoring the fact that a *monopoly* differs vastly from an individual or a corporation. A monopoly is necessarily more prone toward excesses and exploitation, and thus has been more closely watched and regulated across the board. *See, e.g.*, the Sherman Act, 15 U.S.C. §§ 1-7 (1976), the purpose of which is to prevent those practices which create monopolies suppressing or restricting competition and obstructing the course of trade. Based on the contention that monopolies have consistently been closely regulated and should continue to be so regulated, this Author believes that in this case the Court should have enunciated an entirely new set of first amendment values to be placed on the speech of monopolies; giving them a guarantee of freedom of speech which is restricted in such a way as to prevent exploitation and over-reaching.

13. The Court applied a compelling state interest test to the first amendment claim of Consolidated Edison rather than making a reasonable balancing of that interest against the state's interests in protecting its citizens, the utility's ratepayers, against a compelled subsidy of the utility's political and social beliefs and an invasion by the utility of the sanctity of their homes. *See note 29 and accompanying text infra*. The compelling state interest test requires the state to show that there are legitimate, important interests to be protected and that there is no reasonable alternate way to promote that state end.

14. Freedom of speech is included in the rights guaranteed by the first amendment which, in turn, is part of the Bill of Rights. When the Bill of Rights was adopted it was perceived as a limitation of federal encroachment, not a limitation on encroachment of individual liberties by the states.

In 1868 the Fourteenth Amendment was adopted providing in part that a state may not "deprive any person of life, liberty or property, without due process of law." Through judicial interpretation most of the Bill of Rights has gradually been

New York<sup>15</sup> with a broad range of powers.<sup>16</sup> Thus, any action taken by the Commission is impliedly taken by the State.<sup>17</sup>

In *First National Bank of Boston v. Bellotti*,<sup>18</sup> the Court extended the right of freedom of speech to corporations. In a prior decision, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,<sup>19</sup> the Court had extended freedom of speech to corporations only so far as their commercial speech, but did not place the commercial speech in the same esteemed position as individual speech.<sup>20</sup> The Court in *Bellotti* extended a corporation's protected speech to include the corporation's opinions on all topics, holding that just as in the case of the individual, no state may prohibit a business corporation from expressing its

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made applicable to the states by the due process clause of the Fourteenth Amendment.

In *Palko v. Connecticut*, 302 U.S. 319 (1937), Mr. Justice Cardozo speaking for the Court recognized that "[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the fourteenth amendment, become valid as against the states." *Id.* at 324-25 (citations omitted).

The First Amendment has been found to come within the Fourteenth Amendment's scope in *Gitlow v. New York*, 268 U.S. 652 (1925). The Court held that a statute which punished advocacy of an overthrow of government by force was constitutional. In dictum, however, the Court said, "[W]e may and do assume that freedom of speech and of press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.

In *Stromberg v. California*, 283 U.S. 359 (1931), the Court struck down a statute which condemned displaying a red flag in a public place or meeting place stating, "It has been determined that the conception of liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech . . . The right is not an absolute one, and the State in the exercise of its police power may punish the abuse of this freedom." *Id.* at 368.

15. See note 3 *supra* and accompanying text.

16. See note 4 *supra* and accompanying text.

17. See, e.g., *Radio Common Carriers of New York v. Public Service Comm'n*, 79 Misc. 2d 600, 360 N.Y.S.2d 552 (1974).

18. 435 U.S. 765 (1978). In *Bellotti* the Court held a Massachusetts statute violative of the First Amendment because it purported to prevent corporate management from using corporate funds to publish views on political and social issues which had no effect on the business of the corporation. This differs from the present case in that Consolidated Edison is not using corporate funds but moneys taken from its reasonable rate of return which comes from its ratepayers, and not from the corporate treasury.

19. 425 U.S. 748 (1976).

20. *Id.* Prior to the decision in *Virginia State Board of Pharmacy*, commercial speech had not been given first amendment protection. The Court concluded, however, that while commercial speech was to be accorded this protection, "some forms of commercial speech regulation are surely permissible." 425 U.S. at 770.

views on any specified issue, political or otherwise.<sup>21</sup>

Since the Public Service Commission's ban on bill inserts limited the means by which Consolidated Edison could "participate in the public debate on [nuclear power] and other controversial issues of national importance,"<sup>22</sup> the Court found that based on its prior decision in *Bellotti*,<sup>23</sup> the ban "strikes at the heart of the freedom to speak."<sup>24</sup> The majority then addressed first amendment issues, giving a rather cursory review to the interests of the utility's consumers which the ban had sought to protect. But when there are competing substantive rights, often a balancing of the interests is made.<sup>25</sup> The majority attempted such a balancing test, but the scales seemed to be weighted in favor of Consolidated Edison's right to free speech. The Court merely held that the privacy rights involved were not substantial<sup>26</sup> and dismissed the Public Service Commission's argument that the distribution of bill inserts amounted to a forced subsidy. They claimed that

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21. The majority's reliance on *Bellotti* is inappropriate. Justice Powell, writing for the Court in *Bellotti* noted that Justice White's dissent in that case relied heavily on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), see note 112, *infra*, and *Machinists v. Street*, 367 U.S. 740 (1961), see note 109, *infra*, decisions which limited the political speech of unions insofar as they compelled the financial support through dues of their political beliefs by all of their members whether or not they agreed with the views expressed. Mr. Justice Powell distinguished these cases from *Bellotti* saying, "[t]he critical distinction here is that no shareholder has been 'compelled' to contribute anything [toward dissemination of the bank's opinions] . . . . [T]he shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason." 435 U.S. at 794 n. 34. *Bellotti* can be distinguished from the instant case in much the same way as were *Abood* and *Machinists v. Street* distinguished by Mr. Justice Powell. Because of the unique relationship between Consolidated Edison and its consumers, they are compelled to be associated with the utility and, therefore, with its beliefs. Also, because of its rate structure its consumers are compelled, as a condition of receiving power in New York City, to finance the bill inserts, a fortiori, the dissemination of Consolidated Edison's political views. See Comment, *Utility Rates, Consumers, and the New York State Public Service Commission*, 39 ALBANY L. REV. 707, 721-23 (1975); note 56, *infra*.

22. 100 S. Ct. at 2331.

23. 435 U.S. 765, see note 18, *supra*.

24. 100 S. Ct. at 2332.

25. The right of free speech has often conflicted with other substantial, fundamental rights. In many of the shopping center cases which involved the exercise of first amendment rights in privately owned shopping centers the picketers' interest in freedom of speech conflicted with property rights of the shopping center owners. This required a balancing of first amendment rights against rights of owners of private property which had been opened for use by the general public. See, e.g., *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976). In the many cases involving civil rights demonstrations the marchers' free speech interests conflicted with the municipality's legitimate concern for its citizens. See, e.g., *Adderley v. Florida*, 385 U.S. 39 (1966); *Cox v. Louisiana*, 379 U.S. 536 (1965). These cases required the balancing of one interest against another on the scales of justice and so, too, does the instant case. See also, *Hynes v. Mayor of Oradell*, 425 U.S. 610, 616-17 (1976).

26. 100 S. Ct. at 2335. But see, notes 79-87 *infra* and accompanying text.

the ban was based entirely on content of the inserts no matter who was paying for them.<sup>27</sup>

Since a limitation on the content of speech is not per se invalid,<sup>28</sup> the Court's decision striking down the Commission's ban on the bill inserts in question rested on consideration of "whether the prohibition is (i) a reasonable time, place, or manner restriction, (ii) a permissible subject-matter regulation, or (iii) a narrowly tailored means of serving a compelling state interest."<sup>29</sup>

27. 100 S. Ct. at 2336. *But see*, 100 S. Ct. at 2340 n.1 (Blackmun, J., dissenting), in which it is pointed out that the Commission expressly stated in its denial for a rehearing that its ban was based in part on the compelled association.

28. In *Gitlow v. New York*, 268 U.S. 652 (1925) the Court stated:

It is a fundamental principle, long established, that the freedom of speech . . . which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom . . . Reasonably limited . . . , this freedom is an inestimable privilege in a free government; without such limitation, it might become the scourge of the republic.

*Id.* at 666-67. *See, e.g.*, *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), in which a zoning ordinance requiring that "adult" motion picture theatres be located at least 1,000 feet from any two other "regulated uses" or at least 500 feet from a residential area was held not violative of the First Amendment even though the regulation was based upon the content of the films shown at the theatres.

29. 100 S. Ct. at 2332. This breakdown of the analysis the Court is following is significant since it signals that the compelling state interest test will be applied. This test puts the burden on the state to prove that it has a substantial interest in placing a restriction on so important a right. Freedom of speech is "susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 639 (1943), in which the Court held that the state did not have a compelling state interest in mandating that all children must pledge allegiance to the flag at school. The Court could have applied a balancing test of the interests involved since the interests the state sought to be protected by the ban should have been accorded the highest level of review as should Consolidated Edison's freedom of speech, assuming the utility is treated as a corporation as opposed to a monopoly. *See* notes 12 and 25 *supra*. The Courts of the State of New York have ruled that a regulation promulgated by the Public Service Commission, which is, in fact, within its jurisdiction to make, "will not be set aside if there is a *rational basis* for the conclusion reached." (emphasis supplied). *See* note 11 *supra*. This would imply that a rational basis approach, one in which the regulation is upheld if there is a legitimate purpose for the regulation and the regulation is a reasonable means to that end, might be used, but the Court does not even consider this. In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court held that the government had a compelling interest in prohibiting mutilation of draft cards, and set out guidelines for judging the constitutionality of a government regulation:

[A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on al-



The Court applied this compelling state interest test since it believed that the Commission's ban was entirely content-based<sup>30</sup> requiring more careful scrutiny.<sup>31</sup> For that reason, the majority refused to apply a reasonable time, place, or manner test to the regulation. That test is used where speech is regulated, but not precluded.<sup>32</sup> It is the position of this article that even though the Court applied the stringent compelling state interest test, it should not have struck down the Commission's ban on bill inserts.

#### A. Reasonable Time, Place, or Manner Restriction

A reasonable time, place, or manner test is applied when speech is not proscribed entirely, but the state merely seeks to regulate the time, place, or manner of the manifestation of the expression for a valid reason.<sup>33</sup> A time, place, or manner regulation is not a restriction which is based solely on content. It serves both a legitimate governmental interest and leaves open adequate alternative channels for communication.<sup>34</sup>

According to the dissent<sup>35</sup> and the New York Court of Ap-

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leged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

*Id.* at 377.

30. See note 27 *supra* and accompanying text.

31. 100 S. Ct. at 2332. "[W]hen regulation is based on the content of the speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove of the speaker's views.'" (Quoting *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring in the result)).

32. See, e.g., *Adderly v. Florida*, 385 U.S. 39 (1966), in which a statute precluding demonstrations on property not generally open to the public was upheld as a valid restriction on time, place, or manner. It was held that since the demonstrators were free to express themselves in other, more appropriate forums the regulation did not violate their first amendment rights.

33. "The essence of time, place or manner regulation lies in the recognition that various methods of speech regardless of their content, may frustrate legitimate governmental goals . . . . A restriction that regulates only the time, place or manner of speech may be imposed so long as its [sic] reasonable." 100 S. Ct. at 2332. See, e.g., *Cox v. Louisiana*, 379 U.S. 536, 554 (1965), in which the Court overturned convictions based on disturbing the peace and obstructing public passages at an orderly civil rights march as not being a reasonable time, place, or manner regulation. The Court made clear that "rights of free speech and assembly . . . do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time," but found that the regulation, in this particular case, went far beyond regulation of time, place, or manner. *Id.* at 554.

34. See, e.g., *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), note 47 *infra*. See also, *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), in which the Court upheld a statute requiring paraders to obtain a special license from the city. "Where a restriction . . . is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of some civil right which in other circumstances would be entitled to protection." *Id.* at 574.

35. 100 S. Ct. at 2342-43.

peals,<sup>36</sup> the Public Service Commission's ban properly seeks only to limit the manner in which Consolidated Edison wishes to express its opinions. The ban covers only inserts placed in the billing envelopes of the consumers. It does not attempt to preclude Consolidated Edison from spending its own corporate funds derived solely from profits otherwise available to the corporation's shareholders,<sup>37</sup> for promulgating its opinions in any other manner. Nor does it truly discriminate as to content, *per se*.<sup>38</sup> No matter what the utility's view on a particular subject, there will inevitably be some in its vast audience who will object to that view. The billing envelope is, therefore, seen by the New York Court of Appeals<sup>39</sup> and the dissent<sup>40</sup> as simply not being the proper forum for the utility, or any other group, to express points of view on controversial issues.

The dissent contended that there were legitimate state interests involved. The Public Service Commission sought only to exercise the jurisdiction granted to it by the State of New York for the purpose of regulating the state-sanctioned monopoly.<sup>41</sup> Since the state saw fit to grant such a broad latitude of power to the Commission, it can be inferred that it wanted to keep a close watch on these monopolies to avoid excesses.<sup>42</sup> The dissent felt that the restriction placed on Consolidated Edison's speech is a reasonable one in that it neither seeks to proscribe the utility's speech *in toto*, nor does it seek to ban only the utility's opinions from the rate envelopes. The regulation seeks only to eliminate *all* opinion from the improper forum of the rate envelope.<sup>43</sup> It does not seek

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36. 47 N.Y.2d at 106, 390 N.E.2d at 755, 417 N.Y.S.2d at 36 (1979).

37. 100 S. Ct. at 2339 (Blackmun, J., dissenting). *See also*, notes 91 & 105 and accompanying text *infra*.

38. *See* note 28 *supra*.

39. *See* note 9 *supra*.

40. 100 S. Ct. at 2340-41.

41. *See* note 11 *supra*.

42. "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching." 100 S. Ct. at 2340 (Blackmun, J., dissenting). *See also*, *Rochester Gas and Electric Corp. v. Public Serv. Comm'n*, 414 N.Y.S.2d 754, 66 A.D.2d 509 (1979); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), note 61 *infra*.

43. The improper forum for particular speech was discussed at length in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), in which a particular monologue by a comedian which contained both political satire and obscenity was broadcast over the radio and was held to be patently offensive and indecent by the FCC. The Court upheld the FCC ruling "even though the monologue would be protected in other contexts." *Id.* at 746. This is because a radio broadcast comes into the home and in the privacy of the home the individual's right to be left alone plainly out-

to ban the utility from expressing its views in any other more suitable forum. As such, the Commission's ban could meet the Court's own criteria of a valid time, place, or manner restriction of the First Amendment right of free speech.<sup>44</sup>

The Court, however, did not see fit to view the ban as a time, place, or manner regulation, but saw it as purely content-based. Nor did it choose to recognize that monopoly status places Consolidated Edison on a different footing than a corporation. Rather it applied the compelling state interest test, as it would to any regulation of the expression of individuals or corporations, after having first decided that the ban was not a permissible subject matter regulation. It is the position of this article that even following the stringent compelling state interest test, the Commission's ban on bill inserts on controversial topics could have been upheld.

### *B. Permissible Subject Matter Regulation*

For a regulation to be a valid time, place, or manner restriction, the court states that as a prerequisite to validity it must be "applicable to all speech irrespective of content."<sup>45</sup> Mr. Justice Stevens wrote a concurring opinion in which he made pointed reference to Mr. Justice Powell's sweeping generality that there may not be such a restriction placed on speech.<sup>46</sup> He stated:

Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a time, place, or manner restriction may not be based upon either the content or subject matter of speech.<sup>47</sup>

The regulation, however, may be based on the content as long as the limitation is reasonable and justified by significant state concerns.<sup>48</sup> *Lehman v. Shaker Heights* shows that the rule of content neutrality—that speech may not be regulated solely on content—

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weighs the First Amendment rights of an intruder. *Id.* at 748. Although the majority dismisses it and the dissent overlooks it, this is one of the propositions on which this author believes this case should rest. See *Rowan v. Post Office Department*, 397 U.S. 728 (1970); note 65, *infra*.

44. See note 33 *supra* and accompanying text.

45. 100 S. Ct. at 2331.

46. *Id.* at 2332.

47. *Id.* at 2337 (Stevens, J., concurring in the judgment).

48. *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, the Court upheld the refusal of a municipal transit system to allow a political candidate to buy advertising space on public transportation while allowing commercial advertising. The basis of the decision was that public transit advertising was not an appropriate first amendment forum and as such, minimizing the appearance of political favoritism, the abuse of which could result from allowing political ads on public transit, and the risk of imposing these views on a captive audience, were concerns portraying a compelling state interest.

does not truly exist.<sup>49</sup> The Court attacked the Commission's candid admission that the regulation against the inserts was based on their controversial nature.<sup>50</sup> Even though the Commission asserted that the ban was not content-based because all viewpoints on a controversial issue were banned from that particular forum,<sup>51</sup> the Court ignored this view. In this way the Court avoided judging the ban as a valid time, place, or manner regulation.<sup>52</sup>

### C. *Narrowly Tailored Means of Serving A Compelling State Interest*

The Court recognized that subject matter regulations have been approved when the government bars the speech from its own facilities as being too disruptive<sup>53</sup> of the legitimate purpose for which the facility had been dedicated.<sup>54</sup> The Commission's ban, it was held by the Court, was based on no such legitimate state interest and neither *Greer v. Spock* nor *Lehman v. Shaker Heights* applied<sup>55</sup> because in both cases, a private party had sought to use public facilities of the state to exercise their expression. In the instant case, the Court felt that Consolidated Edison sought only to use its private billing envelopes to proselytize. The Court did not accept the assertion by the Public Service Commission<sup>56</sup> and the dissent,<sup>57</sup> that although the billing envelopes emanate from Consolidated Edison, the costs of the envelope and the postage are passed along to the utility's customers<sup>58</sup> who, in that sense,

49. Note, *Constitutional Law—First Amendment—Content Neutrality*, 28 CASE W. RES. L. REV. 456, 478 (1977).

50. 100 S. Ct. at 2333.

51. See notes 41-44 *supra* and accompanying text.

52. "Governmental action that regulates speech on the basis of its subject matter 'slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" *Id.* at 2332. See also *Police Department v. Mosley*, 408 U.S. 92, 99 (1972).

53. *Greer v. Spock*, 424 U.S. 828 (1976), see note 55 *infra*; *Lehman v. Shaker Heights*, see 418 U.S. 298 (1974) note 48 *supra*.

54. 100 S. Ct. at 2333.

55. In *Greer v. Spock*, 424 U.S. 828 (1976), it was held that partisan speech on a controversial topic could be prohibited on a military base. In *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), the speech was prohibited on a municipal transit system. See note 48 *supra*.

56. 100 S. Ct. at 2336.

57. *Id.* at 2342 (Blackmun, J., dissenting).

58. See, Comment, *supra* note 21, at 714, which states that a utility's rate formula is:

$$\begin{array}{c} (\text{RATE BASE} \times \text{RATE OF RETURN}) \\ + \end{array}$$

"own" the envelopes.<sup>59</sup> The Court was not persuaded by the argument that Consolidated Edison is a state-created monopoly<sup>60</sup> and, because of this, broad regulation is "necessary to protect the consumer from exploitation."<sup>61</sup>

In contrast, the dissent felt that the state does, indeed, have a compelling interest in seeing that the monopoly powers it bestowed on the utility, including having provided it with a broad-based captive audience, are not abused. The compelling state interests evident in *Lehman* apply with equal force regarding the Commission's ban on topical inserts in utility bills.

Another compelling state interest recognized as substantial by the State Court of Appeals<sup>62</sup> was that the bill inserts intruded upon the right of privacy of Consolidated Edison's customers. The dissent did not deal with this argument at all since it felt the entire case should have rested upon the "forced subsidy" issue.<sup>63</sup>

The Court dismissed the consumer's right to privacy with all the solicitude Marie Antoinette exercised in dealing with her subjects. "The customer of Consolidated Edison may escape exposure to objectionable material simply by transferring the bill insert from the envelope to wastebasket."<sup>64</sup> The Court refused to apply a "captive audience"<sup>65</sup> label to the ratepayers. While it fully

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OPERATING EXPENSES =	REVENUE
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Operating expenses are described as cost of labor, maintenance, materials and supplies (including the rate envelope and postage and all other expenses incurred in sending out the bill including costs of preparation of the inserts themselves).

59. See note 5 *supra*.

60. See notes 4 and 5, *supra*.

61. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 596 (1976). "[P]ublic utility regulation typically assumes that the private firm is a natural monopoly and that public controls are necessary to protect the consumer from exploitation." *Id.* at 595-96. See also 79 Misc. 2d 600, 360 N.Y.S.2d 552.

62. 47 N.Y.2d 94, 390 N.E.2d 749, 41 N.Y.S.2d 30 (1979).

63. 100 S. Ct. at 2339 (Blackmun, J., dissenting).

64. *Id.* at 2335-36.

65. Content regulation on the premise that the message offends an audience is allowed primarily on the theory that it is a captive audience whose "substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971). In *Cohen*, the Court reversed a conviction of breach of the peace for walking through a courthouse corridor wearing a jacket bearing the words, "Fuck the Draft." The Court found that a substantial privacy interest had not been invaded since people are essentially captives being subjected to objectionable speech outside their homes but can "effectively avoid further bombardment of their sensibilities simply by averting their eyes." *Id.* at 21. The Court, however, has consistently recognized that "government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue." *Id.* In *Rowan v. Post Office Department*, 397 U.S. 728 (1970), the Court upheld the constitutionality of Title III of the Postal Revenue and Federal Salary Act of 1967, 39 U.S.C. § 4009, under which a person desiring not to receive pandering or obscene mail in his own home may require the Post Office to order such a mailer to remove the householder's name from its mailing lists and cease all future mailings

recognized that "where a single speaker communicates to many listeners, the First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectionable speech,"<sup>66</sup> the Court flatly admonished the recipients (after they have already read or at least glanced at the material *in their own homes*, usually the last bastion of privacy) to "avert their eyes."<sup>67</sup>

The Court, then cited *Rowan v. Post Office Department*<sup>68</sup> and acknowledged the "special privacy interests that attach to persons who seek seclusion within their homes."<sup>69</sup> But, thereafter, the Court turned its back on the consumers by analogizing the arrival of the bill and inserts inside the home, to the arrival of a door-to-door solicitor at its threshold.<sup>70</sup>

In *Martin v. Struthers*,<sup>71</sup> regarding the issue of privacy, the Court rejected an ordinance forbidding any person from attempting to summon any occupant of a residence *to the door* of that residence for the purpose of distributing handbills or circulars of religious significance. The Court recognized that in the case of door-to-door solicitation the privacy of the home need not be intruded upon unless the resident chooses to admit the solicitor.<sup>72</sup> In balancing the interests between the annoyance to the householder of an intrusion at his doorstep and the free dissemination of thoughts and ideas of the religious canvasser, the Court found

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to that person. The Court felt that being "captives outside the sanctuary of the home and subject to objectionable speech . . . does not mean we must be captives everywhere." *Id.* at 738. "The ancient concept that 'a man's home is his castle' into which 'not even the king may enter' has lost none of its vitality . . ." *Id.* at 737. See note 43 *supra*.

66. 100 S. Ct. at 2335. But cf. *Gitlow v. New York*, 268 U.S. at 667 in which it was stated that "a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the peace . . ."

67. *Cohen v. California*, 403 U.S. 15 (1971). See note 65, *supra*.

68. 100 S. Ct. at 2336 n.11.

69. 397 U.S. 728 (1970). See note 63 *supra*.

70. *Martin v. Struthers*, 319 U.S. 141 (1943), in which door to door solicitation was held not to violate the right of privacy of a person in his home because the invasion was not substantial enough.

71. *Id.*

72. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

319 U.S. at 147.

the slight annoyance inconsequential compared with the possibility of cutting off the free flow of expression.

## II. ANALYSIS OF THE MAJORITY OPINION

Looking at the situation presented by the instant case, the Court of Appeals of New York<sup>73</sup> saw, not the inconsequential annoyance of *Martin v. Struthers*, but an intrusion comparable to that of the obscene mail in *Rowan*.<sup>74</sup> This intrusion must be examined in depth.

Customers of Consolidated Edison are largely householders. They receive their bills monthly and, a fortiori, receive these inserts monthly along with the bills. Consolidated Edison's bills, along with their inserts, do not courteously stop at the door and ring the bell.<sup>75</sup> They come unceremoniously into the home without permission, and unlike the householder in *Rowan*,<sup>76</sup> the recipient has no choice but to admit them. Once in the home the consumer opens the envelope. In it he finds (1) a bill, (2) another envelope in which to return payment, and (3) additional printed matter—the inserts. The consumer receives a service from Consolidated Edison. Naturally and normally he would think that the additional printed material would pertain to the service he is receiving.<sup>77</sup> As such, the average consumer will at least begin to read the "literature" and might well be offended by its intrusion into his home. The offense and the intrusion has already been committed. The "wastebasket" escape envisioned by the Court does not eradicate so substantial an invasion into the privacy of the home.

### A. *The Right to be Let Alone*

"The issue of whether there is a right to be free from speech poses a sharp conflict between freedom of speech, on the one hand, and privacy, on the other."<sup>78</sup> The right of privacy does not

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73. 47 N.Y.2d at 106, 390 N.E.2d at 755, 417 N.Y.S.2d at 36-37. The court felt that consumers of utility services were destined to have contact with everything in the billing envelopes and that the inserts, therefore, violated the impenetrable privacy barrier which surrounds the home.

74. 397 U.S. 728. See note 65 *supra* and accompanying text.

75. See notes 70-72 *supra* and accompanying text.

76. See note 65 *supra* and accompanying text.

77. As a ratepayer of a utility one reasonably assumes that any communication in the rate envelope would relate to the service received, e.g., a cut-off notice or notification that the utility's rates were going up again.

78. Haiman, *Speech v. Privacy: Is There a Right Not To Be Spoken To?*, 67 Nw. U.L. REV. 153, 154 (1972). [Hereinafter cited as *Speech v. Privacy*]. See also, Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COL. L. REV. 960, 967 (1953): "What is perfectly clear is that the claim to freedom from unwanted speech rests on grounds of high policy and in convictions of human dignity

come directly from a specific provision of the Bill of Rights. It has been inferred from the common law and by judicial decision from the penumbras of the first, third, fourth, fifth and ninth Amendments.<sup>79</sup> It has been held to be a right so fundamental that the framers did not feel its inclusion along with the enumerated liberties to be necessary.<sup>80</sup>

The law was slow to develop. "[I]n very early times, the law gave a remedy only for physical interference with life and property . . . . Gradually the scope of these legal rights broadened, and now the right to life has come to mean the right to enjoy life—the right to be let alone . . . ."<sup>81</sup> Since 1890, when Samuel Warren and Louis Brandeis wrote their famous law review article which gave significance to the tort of defamation, our society has undergone a myriad of changes giving rise to a need for even more protection by the right of privacy than those noted writers envisioned.<sup>82</sup>

In their many decisions protecting the rights of criminals, the Warren court took major steps to ensure that the right of privacy was protected.<sup>83</sup> The Court found that there were zones of privacy created by a person where a reasonable expectation of privacy could be inferred.<sup>84</sup> The Burger court enhanced the concept and reinforced the Court's high regard for the sanctity of the home by holding that a warrantless arrest, absent exigent circumstances, may not be made in a suspect's home.<sup>85</sup> The Court re-

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closely similar to if not identical with those classically brought forward in support of freedom of speech in the usual sense."

79. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1975). In *Griswold* the court established a "zone of privacy created by several fundamental constitutional guarantees," and struck down a law which prohibited the use of contraceptives by married couples, basing its rationale on this right of privacy. *Id.* at 485.

80. *Id.* at 488-93 (Goldberg, J., concurring).

81. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

82. In recent decades, the population growth coupled with the trend towards greater urbanization, have combined to crowd us all closer together, and to make it more difficult to live in isolation from possibly unwanted communications of our fellow men. At the same time, the increasing extent to which speech has become militant and abrasive has led its sometimes reluctant hearers to yearn for "freedom from speech" rather than "freedom of speech."

*Speech v. Privacy*, *supra* note 78, at 153.

83. See, e.g., *Katz v. U.S.*, 389 U.S. 347 (1967).

84. In *Katz* there was a reasonable expectation of privacy in a public telephone booth during a private conversation where the doors of the booth were closed.

85. *Payton v. New York*, 445 U.S. 573 (1980).



quired a warrant for arrest in the suspect's home because it understood that nowhere "is the zone of privacy more clearly defined than when bounded by the unambiguous physical terms of an individual's home."<sup>86</sup> This simply reinforces many past decisions in criminal and non-criminal cases which regarded the home as a citadel against substantial invasions of privacy.<sup>87</sup> The Court chose, in this case, to open the doors of the home to such an inescapable invasion,<sup>88</sup> justifying its holding, although it is never expressly stated as such, by expanding first amendment protection to include monopolies.

The Court did not find that the Public Service Commission had a compelling state interest in regulating the inserts of Consolidated Edison. The Court noted that if there were a compelling state interest, "it is possible that the State could achieve its goal simply by requiring Consolidated Edison to stop sending bill inserts to the homes of objecting customers."<sup>89</sup> Requiring Consolidated Edison to omit its objecting customers from the insert mailing is possible but would not alleviate the forced subsidy entirely. The cost of the inserts which still go out will be passed along to all of Consolidated Edison's ratepayers, not just those who want to receive them.<sup>90</sup> In view of the fact that all costs of the corporation's political speech should be borne solely by the shareholders and charged to an income account,<sup>91</sup> this alternative

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86. *Id.* at 589.

87. *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), in which an ordinance allowing suppression as a nuisance of any movie containing nudity which is visible from a public place was held offensive to first amendment rights because it was overbroad. The Court stated, however, that "[s]uch selective restrictions have been upheld only when the speaker intrudes on the privacy of the home." *Id.* at 209. In *Rowan v. Post Office Department*, the Court is most eloquently emphatic about privacy in the home and is on point with the instant case:

In today's complex society we are inescapably captive audiences for many purposes, but a sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail . . . . [I]t seems to us that a mailer's right to communicate must stop at the mailbox of an unreceptive addressee . . . . If this prohibition operates to impede the flow of even valid ideas, the answer is that no one has a right to press even good ideas on an unwilling recipient.

397 U.S. at 736-38. *See also*, *Stanley v. Georgia*, 394 U.S. 557 (1969); *see* note 10 *supra*. In *Public Utilities Commission v. Pollak*, 343 U.S. 451, 464 (1952) a regulation of the Public Utilities Commission of the District of Columbia which allowed music and commercial messages to be piped into public transit vehicles was upheld, the Court stating that the right of privacy of a passenger on a public vehicle does not equal "the privacy to which he is entitled in his own home." *Id.* at 464.

88. *See* notes 75-77 and accompanying text, *supra*.

89. 100 S. Ct. at 2336 n.11.

90. *See* note 58 *supra*.

91. *Southwestern Electric Power Co. v. Federal Power Commission*, 304 F.2d 29 (5th Cir. 1962) cert. denied, 371 U.S. 924 (1962). *Cf.* *Cammarano v. U.S.*, 358 U.S. 498 (1959), which upheld disallowance of ordinary and necessary business expense deductions for grass-roots lobbying, and *Buckley v. Valeo*, 424 U.S. 1 (1976), which

suggested by the Court is not viable. Alternatively, they suggested that the Public Service Commission might lawfully order Consolidated Edison to include inserts of opposing viewpoints. This overlooked the rationale on which the Commission turned down the very same request from the NRDC. The Commission ruled that the content of the insert makes no difference, it could be pro or con, it is the protection of the privacy of the consumer in his home which is paramount.<sup>92</sup>

The Commission's ban on bill inserts did not preclude Consolidated Edison from speaking, but left open alternative means of communicating these ideas. That other modes of speech which remain available may be more costly is not determinative where the offending party has failed to demonstrate that this regulation will, in effect, wholly preclude it from exercising its rights.<sup>93</sup> Consolidated Edison may advertise its views on public issues on television or radio, in newspapers or magazines, on billboards or by skywriting. These channels of communication, albeit more costly,

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struck down limits on individual political campaign contributions while approving limitations on political contributions made by a corporation. "It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969). *Red Lion* involved a challenge to the FCC's "fairness doctrine" which required that each broadcaster must give fair coverage to each side of a public issue presented or the broadcaster would lose his license. The Court upheld the "fairness doctrine" as not violative of the first amendment rights of public broadcasters and consistent with the first amendment rights of the public. "Otherwise station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed." *Id.* at 392.

In *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94 (1973), utilizing the same rationale that the rich could command the use of the airwaves if allowed unfettered freedom, the Court held that a broadcaster was not compelled to accept paid editorial advertisements, stating, "[b]ecause the broadcast media utilizes a valuable and limited public resource, there is also present an unusual order of First Amendment values." *Id.* at 101.

In much the same way that *Red Lion* and *Columbia Broadcasting System* rely on the scarcity of broadcast frequency to balance the scale of first amendment values, so, too, should the Court in the instant case have done. Consolidated Edison, by sending its messages along with its bills to every household and business in New York City, certainly has a valuable and scarce channel of communication which is closed to most since the cost of such a mailing would be prohibitive, whereas Consolidated Edison passes it on to its consumers.

92. See notes 65-77 *supra* and accompanying text.

93. *Kovacs v. Cooper*, 366 U.S. 77 (1948), in which the Court upheld an ordinance prohibiting the use of sound tracks on public streets and thoroughfares for dissemination of items of news and public concern as merely regulatory as opposed to a prohibition since "[s]ound trucks may be utilized in places such as parks or other open spaces off the streets." *Id.* at 85.

are not banned by the order of the Public Service Commission. Therefore, the Commission's order, in addition to being a reasonable time, place, or manner restriction,<sup>94</sup> is also an effective, narrowly drawn restriction justified by a compelling state interest.<sup>95</sup>

The Court, however, did not accept as persuasive the arguments put forth to show that the Public Service Commission had a compelling interest in restricting Consolidated Edison's use of the rate envelopes to disseminate its political, economic and social points of view. The Court found that the right of privacy involved was not substantial enough to deprive the utility of its free speech.<sup>96</sup>

### III. THE DISSENTING OPINION

While being very careful to reaffirm his strong sensitivity to the protection of free speech "by the First and Fourteenth Amendments against repression by the State,"<sup>97</sup> Justice Blackmun balanced the interests involved in this case and could not find a violation of Consolidated Edison's right to freedom of speech. Of paramount importance to the dissent was the fact that Consolidated Edison is a utility sanctioned by the State of New York.<sup>98</sup> Because of this monopoly status and Consolidated Edison's rate structure,<sup>99</sup> "the use of the insert amounts to an exaction from the utility's customers by way of forced aid for the utility's speech."<sup>100</sup> The legislature of the State of New York foresaw that the sanctioned monopoly status of a utility might lead to excess and abuse and saw fit to arm the Public Service Commission with broad powers.<sup>101</sup>

Under the law of the State of New York, the Public Service

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94. See notes 33-44 *supra* and accompanying text.

95. Since the restriction does not proscribe Consolidated Edison's speech, see note 92 *supra* and accompanying text, and the forced subsidy could not be eliminated without banning the bill inserts, the restriction is as narrowly drawn as possible.

The compelling state interests involved are the substantial privacy rights of the utility's ratepayers, see notes 74-87, *supra*, and the protection of their right of free association by preventing a forced subsidy of Consolidated Edison's opinions, see notes 98-107 *infra* and accompanying text.

96. But see notes 64-67 and accompanying text, *supra*.

97. 100 S. Ct. at 2339 (Blackmun, J., dissenting).

98. N.Y. PUB. SERV. LAW § 68 (McKinney 1955).

99. See note 58 *supra*.

100. 100 S. Ct. at 2339 (Blackmun, J., dissenting).

101. "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching." 100 S. Ct. at 2340 (Blackmun, J., dissenting).

Commission can regulate the rates utilities may charge.<sup>102</sup> The Public Service Commission has authorized that a utility's rates may reflect only the costs of providing necessary services to its customers plus a reasonable rate of return to its shareholders.<sup>103</sup> "The entire bill payment system—meters, meter readings, bill mailings and bill inserts—are paid by the customers under Commission rules permitting recovery of necessary operating expenses."<sup>104</sup> Since the customers are paying for the inserts, it is a forced subsidy for the promulgation of the utility's beliefs. A public utility cannot include in its rate base, and therefore pass on to its customers, the costs of political advertising and lobbying, but must pass these costs along entirely to its shareholders.<sup>105</sup> The benefit derived from the inserts is a furtherance of Consolidated Edison's business interests. (It cannot seriously be contended that the promotion of nuclear power is a public issue which in no way effects the utility). As such, the inserts constitute non-trade advertising, and cost for this should not be borne by the ratepayers "because they derive no service-related benefit from it."<sup>106</sup> According to the dissent, to do otherwise would be a forced subsidy, a fortiori, a compelled association with the utility's beliefs in violation of the first amendment's guarantee of freedom of association.<sup>107</sup>

The Court has, in the past, decided a line of cases dealing with violations of the freedom of association, beginning with *Railway Employees' Department v. Hanson*.<sup>108</sup> Although *Hanson* was decided on other grounds, the question upon which the Court ex-

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102. See note 5, *supra*.

103. See note 58, *supra*.

104. 100 S. Ct. at 2340 (Blackmun, J., dissenting).

105. *Southwestern Electric Power Co. v. Federal Power Commission*, 304 F.2d 29 (5th Cir. 1962), in which a regulation by the Federal Power Commission requiring that utilities keep books indicating that the costs of advertisements are paid out of corporate funds, not subsidized by the consumer, was upheld as not violating the utility's First Amendment rights. See also *Cammarano v. United States*, 358 U.S. 498 (1959).

106. 304 F.2d 29.

107. See notes 108-18 *infra* and accompanying text.

108. 351 U.S. 225 (1956). In *Hanson* the Court upheld a union shop agreement requiring financial support for a collective bargaining agency by all those who received the benefits of its work. This was viewed as being within the power of Congress to order. The Court, however, reserved judgment regarding the violation of the rights to freedom of conscience, freedom of association and freedom of thought protected by the first and fifth amendments because they were not part of the record of the immediate case. The rights were presented by the union as having placed ideological and political restrictions on its members by using their dues to finance political causes.

pressly reserved judgment therein was presented in *Machinists v. Street*,<sup>109</sup> which held a forced subsidy of a union's political views unconstitutional. Justice Douglas, in a concurring opinion, agreed with the Court's denial of the Union's authority to spend an employee's money for political causes which he opposed, on the ground that while a union shop agreement constitutes a compelled association for the benefit of the employee and as such must be upheld, employees must be protected against compelled financing of the union's political beliefs:

Once an association with others is compelled by the facts of life, special safeguards are necessary lest the spirit of the First, Fourth, and Fifth Amendments be lost and we all succumb to regimentation . . . . If an association is compelled, the individual should not be forced to surrender any matters of conscience, belief or expression. He should be allowed to enter the group with his own flag flying . . . , and he should not be required to finance the promotion of causes with which he disagrees.<sup>110</sup>

In the instant case, the association of the ratepayers with Consolidated Edison is compelled by the State of New York which permits that company and other utilities to operate as monopolies because it has determined that "the public interest is better served by protecting them from competition."<sup>111</sup> The designation of a union as exclusive representative carries with it great responsibilities,<sup>112</sup> and an analogy can be made between the union in *Machinists v. Street* and the monopolistic utility in the instant case. Arguably, Consolidated Edison cannot prevent those who are forced to associate with it from refusing to associate with its political and ideological beliefs.<sup>113</sup>

What Justice Blackmun and Justice Rehnquist, who joined the

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109. 367 U.S. 740 (1960). In *Machinists*, the Court refused to uphold a provision of a union shop agreement which required all employees to join the union and pay dues which were thereafter used by the union "in a substantial part . . . to finance the campaigns of candidates for federal and state offices whom [some of the union members] opposed, and to promote the propagation of political and economic concepts and ideologies with which [they] disagreed." *Id.* at 744.

110. 367 U.S. at 776 (Douglas, J., concurring). See *Elrod v. Burns*, 427 U.S. 347 (1976), in which the Court held violative of the first amendment freedom of association the practice of dismissals of employees for the sole reason that they were not affiliated with the Democratic party; *Perry v. Sindermann*, 408 U.S. 593 (1972), in which the Court affirmed a reversal of a summary judgment to allow a professor to show that, although untenured and therefore without an expectancy of returning to the same position the next school year, he was not, in fact, rehired because he publicly criticized the college's administration in violation of his first amendment freedoms of speech and association; *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), in which required adherence to a broadly worded teacher's loyalty oath was held violative of the freedom of association.

111. 100 S. Ct. at 2341 (Blackmun, J., dissenting).

112. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), in which the Court prohibited the part of a union shop agreement requiring members to pay fees which will in part be used to contribute to political candidates and further political views which the union, not its individual members, supported.

113. *Id.* at 234-35.

dissent, recognized and the majority ignored is that Consolidated Edison, in its status as monopoly, is the exclusive source of power for residents of New York City and the surrounding areas. Most of its customers are apartment dwellers who have no option but to remain its customers since they have no voice in what type of gas and electric service they receive. Other than equipping a structure with solar reflectors or using candles to illuminate one's home or office, there is no way to totally escape the utility's power in New York City. "Compulsion which comes from circumstances can be as real as compulsion which comes from a command."<sup>114</sup> Just as the streetcar riders in *Public Utilities Commission v. Pollak*<sup>115</sup> and in *Lehman*<sup>116</sup> were there "as a matter of necessity, not of choice,"<sup>117</sup> so, too, were Consolidated Edison's customers a captive audience. The dissent recognized that the consumers here have no choice but to use the utility's service and no choice, therefore, but to receive their billing envelopes. They were a captive audience for the inserts espousing the utility's views on controversial issues with which some did not agree. The dissent was incredulous of the Court's approval to an enforced subsidy.<sup>118</sup>

Justice Blackmun often has recognized the "ivory tower" stance of the Court. In his harsh dissent in *Harris v. McRae*,<sup>119</sup> he rebuked his brethren in the majority who upheld the Hyde Amendment, thereby cutting off Federal funding for medically necessary abortions. He quoted in part from his dissents in *Beal v. Doe*,<sup>120</sup> *Maher v. Roe*<sup>121</sup> and *Poelker v. Doe*:<sup>122</sup> "There is 'condescension' in the Court's holding 'that she may go elsewhere . . . , this is

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114. *Public Utilities Commission v. Pollak*, 343 U.S. at 468 (Douglas, J., dissenting). See note 87, *supra*. Note that in this case, the Court, whose members presumably do not use public transportation in the District of Columbia, held that riders on the public transportation system who were subjected to music, announcements, and commercials broadcast into the streetcars through a loudspeaker were not a captive audience. Mr. Justice Douglas, feet planted on terra firma, realized that it is possible to say that "[I]n one sense it can be said that those who ride the streetcars do so voluntarily. Yet in a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands." *Id.*

115. 343 U.S. 451. See notes 87 and 114 *supra*.

116. 418 U.S. 298. See note 48 *supra*.

117. See note 114 *supra*.

118. 100 S. Ct. at 2339 (Blackmun, J., dissenting).

119. 100 S. Ct. 2671 (1980).

120. 432 U.S. 438 (1977).

121. 432 U.S. 464 (1977).

122. 432 U.S. 519 (1977).

'disingenuous and alarming' . . . , there truly is 'another world' out there the existence of which the Court, I suspect, either chooses to ignore or fears to recognize."<sup>123</sup>

#### IV. IMPACT OF THE CASE

The immediate impact of the Court's decision is to put a monopoly on an equal footing with an ordinary corporation or an individual vis-a-vis the protection accorded its freedom of speech. It is a vital fact that the monopoly status of Consolidated Edison puts it in a unique position, quite unlike the corporation or the individual, of having a captive audience into whose homes it can send its message in the form of bill inserts. Any monopoly holds the captive attention of any parties who by necessity must seek its goods and services.

The Court reached its decision despite the fact that it had been well-settled that the householder could protect himself against receiving undesirable information within the confines of his home.<sup>124</sup> It is also within the power of the State to shut off discourse "upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner."<sup>125</sup> The invasion of privacy within the home, surely a substantial privacy interest,<sup>126</sup> has been invaded by the Court's decision in this case. The Court refused to balance this substantial interest against the type of self-serving speech in which Consolidated Edison was engaging.

If the Court continues to apply the stringent compelling state interest test in future cases, which pits the rights of individuals against first amendment rights of monopolies, we can look forward to an erosion of individual freedoms and an assault upon our homes by service monopolies with such easy access. In addition to the power company, the phone company will have our ear through their billing envelopes. We will be open to unwanted manifestos and treatises from our water company. A consumer simply cannot tell these utilities that he no longer wishes to receive their bills. Their services are necessary and there is nowhere else to turn. The home will no longer be a sanctuary, it will be a public forum.

If the Court had deemed the Public Service Commission's ban on bill inserts as a reasonable time, place, or manner regulation we would not feel so exposed to bill insert messages in our

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123. *Harris v. McRae*, 100 S. Ct. 2701, 2711-12 (1980).

124. *See, e.g., Rowan v. Post Office Department*, 397 U.S. 728 (1970).

125. *Cohen v. California*, 403 U.S. at 21. *See* note 65 *supra*.

126. *See* notes 85-87 *supra* and accompanying text.

homes. The Court seems to be too preoccupied with protecting First Amendment rights despite the reality of the outcome. Perhaps if the monopoly aspect is stressed more, the Court will differentiate between it and an ordinary corporation, and limit its first amendment rights as a necessary adjunct to limitations already imposed on other rights of monopolies.

## V. CONCLUSION

This case required a balancing of interests between the freedom of speech of Consolidated Edison, a monopoly utility, on one hand, and the right of privacy of its consumers on the other. The Court chose to give cursory review to certain vital circumstances of the particular case and treated the monopoly as equal with ordinary corporations and individuals. As a result, they crossed the First Amendment finishing line in favor of the monopoly with blinding speed, if not spellbinding grace.

The Court seems to have accorded first amendment protection to monopolies without expressly recognizing that they were doing so. Perhaps the majority felt that since protection had already been extended to the speech of corporations in *First National Bank of Boston v. Bellotti*,<sup>127</sup> and a monopoly is also a corporation, it was not extending first amendment protection any further. The Court's only reference to Consolidated Edison's monopoly status is in a footnote likening it to the protected speech of "heavily regulated businesses."<sup>128</sup>

It is possible that the Court did not want to rule on the issue at this juncture. The problem of understanding the Court's ruling is not a new one:

Relying on the existence of familiar methods of dealing with certain types of problems, the Court can hold that the government has adopted overly repressive means with some confidence that it has not ventured onto a

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127. See note 18, *supra*.

128. 100 S. Ct. at 2331 n.1. The Court likened Consolidated Edison's speech to information regarding the type of services offered by optometrists in *Friedman v. Rogers*, 440 U.S. 1 (1979), and the prices charged by pharmacists in *Virginia State Board of Pharmacy v. Virginia Consumer's Council*, 425 U.S. 748 (1976). But in both those cases the speech protected was information. It dealt specifically with the goods and services offered rather than with controversial issues. In addition, "heavily regulated businesses" is not synonymous with monopolies. Although the businesses may be heavily regulated they are comprised of many individual companies and the public has the freedom to choose whether to use one or any of them. There is no such freedom of choice when dealing with a monopoly, such as Consolidated Edison, which supplies essential goods or services.



limb. In cases where traditional legal methods are not visible in the foreground, or where the statute cannot be narrowed on its face, the Court often uses some other—possibly concealed—route to its result: it questions the state's intent, it applies a per se rule of absolute protection, it caves in to its own political necessity or it discovers that the first amendment does not apply to the situation at hand.<sup>129</sup>

This case provided an appropriate forum in which the Court could have recognized that a monopoly requires a greater duty imposed upon it than an individual or a corporation to prevent it from exploiting those who have no choice but to accept its services or products. The Court's failure to so hold reinforces Justice Blackmun's observation of the Court's ivory tower attitude.

LYNN K. WARREN

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129. Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 472-73 (1969).